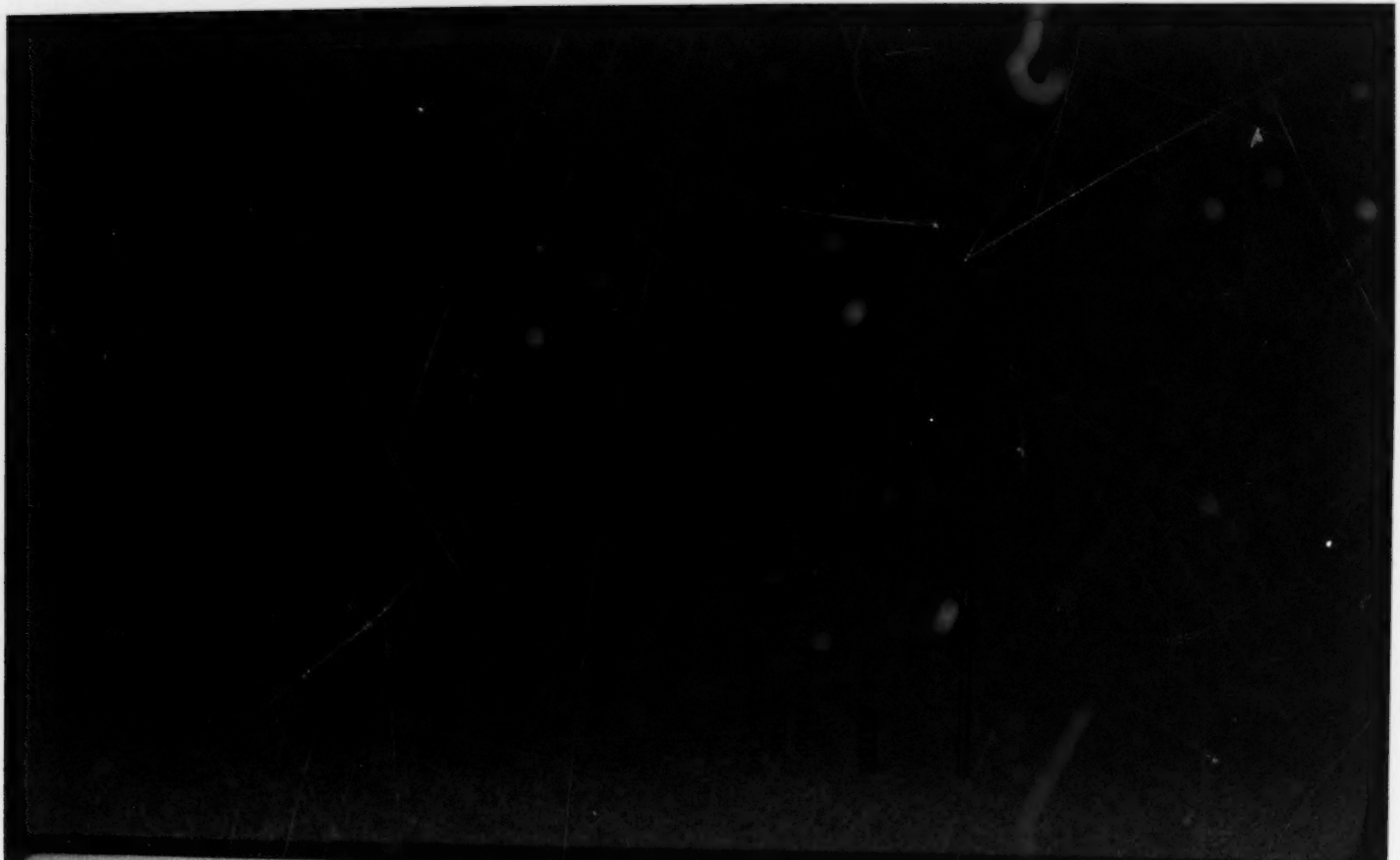

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 864

ARCADE-SUNSHINE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 515–519) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 33–51) are reported in 12 N. L. R. B. 259.

JURISDICTION

The decree of the court below was entered on December 9, 1940 (R. 537–538). Petitions for

rehearing filed by petitioner were denied on January 14, 1941 (R. 525–526), February 6, 1941 (R. 535), and March 13, 1941 (R. 543). The petition for a writ of certiorari was filed on March 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's finding that petitioner discharged William Jones in violation of Section 8 (3) and (1) of the Act.

2. A further question urged by petitioner, but which we think is not properly presented, is whether, in the circumstances of this case, the Board could properly order petitioner to post notices stating *inter alia* that it would not interfere with its employees' right to bargain collectively.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 33–51). The facts found by the Board and shown by the evidence, omitting those relating to

jurisdiction, which is not in question, may be summarized as follows.[1]

Laundry Workers, Cleaners & Dyers Union (herein called the Union) initiated a campaign to organize the laundry workers of the District of Columbia in February 1937 (R. 37; 75–76, 99–100, 112–113). Leaflets were distributed, organizing meetings were held, and a number of petitioner's employees joined the Union (*ibid.*).

In the latter part of June 1937, the Union called a city-wide strike, and although petitioner's employees were not asked to participate in the strike the Union picketed petitioner's plant for several days and some of petitioner's employees voluntarily took part in the picketing (R. 37; 61, 66–67, 417–419, 496).

In the latter part of June 1937, the employees of petitioner's flat-work department, all of whom were colored women, stopped work for a few minutes in support of a demand for a wage increase. Melvin Viner, petitioner's vice president, assured the employees that they would be given a wage increase as soon as his father, petitioner's president, returned to the city (R. 37; 104–105, 109–110, 113–115, 128–129). Several days later, these employees assembled in the plant locker room at the direction of their forelady (R. 38; 100–101, 115–116, 132, 380–381). President Harry Viner

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

informed them that they would get the promised wage increase; he then introduced John Risher[2] to them as a member of their race who would "show [them] the right way to go" (R. 38; 101). Risher told the employees that "the union . . . didn't make any good to [them]," that it was "of no service to the black face," that it was "only trying to get [their] money," that "he would prefer" that they "not . . . bother with the union and that he thought it was best for [them] to organize a union of [their own]" (R. 38; 133, cf. 116, 101, 301–302).

A few days later, while the plant was being picketed, petitioner's officers and supervisors went among the workers and urged[3] them to sign a "loyalty" petition (R. 38–39; 279, 282–283, 285–286, 375–377, 417–420, 393, 104, 102, 129). This "loyalty" petition read as follows (R. 493):

> We, the undersigned, agree to be loyal to the Arcade-Sunshine and remain at our post under present working conditions.

Three hundred and thirty-one of the 357 employees signed the petition (R. 39; 329).

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[2] Risher had worked for petitioner and for President Harry Viner "in a personal capacity" for many years (R. 38; 296, 326–327).

[3] Vice-President Leonard Viner, in requesting a group of employees to sign the petition, told them, according to uncontradicted testimony, "We have got to look for business and make ourselves a living and if you don't join the union and you will go back to work under present conditions, sign this" (R. 104; 102).

On July 3, 1937, Personnel Manager Brisker reprimanded William Parker, an employee, for trying "to agitate the union" and for "trying to get the drivers to join", and warned Parker that he might lose his job (R. 40; 138, 139, 141). That same night President Viner accused Parker of "agitating the union among the drivers" (R. 41; 144, 162). Parker quit his employment that night (R. 45).[4] Several months later Parker requested President Viner to reemploy him; Viner, after commenting upon Parker's dire need and stating that he had got no "benefit" from the Union (R. 41; 146–147), lent Parker $2, and urged him to "talk to the employees * * * to keep them from joining the union" (*ibid.*). Shortly thereafter Parker was rehired on condition that he abstain from union activity (R. 41–42; 150–151).

The Board found that Risher's speech, the circulation of the "loyalty" petition, and the statements to Parker, interfered with the exercise by petitioner's employees of the rights guaranteed in Section 7 of the Act, and therefore that they violated Section 8 (1) (R. 42, 49).

William Jones, a presser and steamer of garments, began to work for petitioner in 1926 (R. 45; 495). Except for a 3-day interval in 1934,[5] he remained in petitioner's employ until his discharge

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[4] The Board dismissed the charge that Parker had been discriminatorily discharged although it thought his case "not free from doubt" (R. 44–45).

[5] He was discharged for "drinking while working", but was rehired 3 days later (R. 45; 484, 485, 495).

in 1937 (R. 45; 170, 484–485, 495). In May 1937, Jones joined the Union and attended meetings, distributed union circulars, and talked about the Union (R. 45; 173, 177, 180).

In June 1937 Jones' foreman questioned him about a union meeting; thereafter President Viner also questioned him about a union meeting, and when Jones professed not to know what had occurred, Viner reproved him, saying, "You can't fool me; I know" (R. 45; 174–175, 176–177). Shortly prior to his discharge, Jones demonstrated his loyalty to the Union by refusing, in the presence of Vice-President Melvin Viner, to sign the "loyalty" petition (R. 45; 185–186).

On July 24, 1937, Jones was under the influence of liquor and could not perform his work (R. 45). Observing his condition, Foreman Branch instructed Jones to go home for a few days and to report to President Viner before returning to work (R. 45; 222, 224). Admittedly, however, Branch did not consider Jones discharged at that time (R. 226). On the following Wednesday, when Jones reported for work, he was not permitted to work; instead he was referred to President Viner, who confirmed his dismissal, and told him that he had talked too much "about the Union" (R. 46; 189).

Petitioner contended that it discharged Jones because he was frequently under the influence of liquor. His foreman testified that Jones was drunk practically every day of the eleven years that he had worked for petitioner and that his

usual output was about 10 or 12 percent of a fair day's work (R. 212–213); President Viner testified that he had instructed the foreman to discharge Jones on "about a hundred or two hundred" occasions, and at times as often as "three times a day" (R. 46–47; 442, 436). The Board concluded, as did the Trial Examiner, that this testimony was fabricated to conceal the real reason for Jones' discharge (R. 47; 25). The Board found that petitioner discharged Jones "because of his membership in and activity on behalf of the Union" (R. 48), in violation of Section 8 (3) and (1) of the Act.

Upon these findings, the Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement with back pay to Jones; to pay to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of Jones on work-relief projects; and to post appropriate notices (R. 50–51).

On February 6, 1940, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 1–4). On March 12, 1940, petitioner moved in the court below for permission to post notices that it would cease and desist from certain practices and for a summary order denying enforcement to the affirmative provisions of the Board's order (R. 502–506). On June 7, 1940, the court denied petitioner's motion (R. 514). On December 9, 1940, the court handed down its opinion

(R. 515–519) and entered a decree (R. 519–521) enforcing the Board's order, except as to the "work relief" provision held invalid in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, which the court set aside.

A petition for rehearing filed by petitioner (R. 521–525) was denied on January 14, 1941 (R. 525–526). Leave to file a petition for reconsideration of the petition for rehearing (R. 527–533) was granted, and the petition was again denied, on February 6, 1941 (R. 535). On March 7, 1941, the court of its own motion amended its opinion and decree with regard to the contents of the notices which petitioner was required to post, by substituting the statement that petitioner would "not engage" in the unfair labor practices found for the statement that it would "cease and desist" therefrom (R. 518–519, 536–538, 542). A further petition for rehearing (R. 539–542) was denied on March 13, 1941 (R. 543).

ARGUMENT

1. Petitioner contends that the main issue in this case is whether the presence of a valid cause for the discharge of an employee conclusively establishes that the employer did in fact discharge the employee for that cause; that the court below avoided deciding that issue by omitting to state in its opinion, as originally filed, that the Board found that Jones was under the influence of liquor on the day of his discharge and could not do ~~the~~ his work; and

that the court thereby deprived petitioner of due process.

The petitioner's contention, which he claims that the court below refused to decide, is plainly frivolous. The presence of a valid cause for a discharge, though relevant to explain what otherwise appears to be a discriminatory discharge, is not conclusive, but merely gives rise to a conflict in the evidence, the resolution of which is for the Board. Compare *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 330–333; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 870 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. (2d) 291, 292 (C. C. A. 4th).

Following the petitioner's petition for rehearing, the court below amended its opinion to state that the Board found that Jones was under the influence of liquor when discharged (R. 525). Thereby the court plainly indicated its rejection of petitioner's contention that the presence of a valid cause for Jones' discharge precluded the Board from finding that his discharge was in violation of the Act. It is, moreover, a novel suggestion that an omission by a court to discuss an issue in its opinion constitutes a denial of due process.

What petitioner really seeks is to have this Court review the sufficiency of the evidence to support the Board's finding that the discharge of Jones was violative of the Act. This question is, of course, of no general importance; petitioner so realizes, but seeks to becloud the case by unrestrained attacks on the court below. (See Pet. 10–11, 8–9.) This invective is particularly unwarranted in view of the patience exhibited by the court below in its consideration of petitioner's repeated applications for rehearing.

2. Petitioner also contends (Pet. 4, 28–29) that the court below did not follow the decision of this Court in *National Labor Relations Board* v. *Express Publishing Company,* No. 442, this Term, decided March 3, 1941. Its argument is that it had not violated Section 8 (5) of the Act (which requires an employer to bargain collectively with its employees' statutory representative), and that therefore the Board could not require it to post notices stating, *inter alia,* that it would not interfere with its employees' right to bargain collectively.

Petitioner did not object to the Board's order on this ground when its validity was under consideration by the court below.[6] To the contrary, petitioner in effect invited the court below to affirm

[6] Petitioner concedes (Pet. 29) that the objection was not urged until after the court below had rendered its decision and had denied petitioner's first petition for rehearing.

this provision of the order by stating in its brief: "Respondent has been ready and willing to post notices for a long time, * * * such offer renders this question moot" (Pet. brief below, pages 4–6). It further stated in its brief below that it had voluntarily posted notices containing the very statement to which it now objects (*ibid.*). It is not surprising, therefore, that the court below did not mention the point either in its original decision or in its opinion on rehearing. This Court has repeatedly indicated that it does not regard the affirmance of an order under such circumstances as an adjudication meriting review. *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* No. 152, this Term, certiorari denied, October 14, 1940; *Subin* v. *National Labor Relations Board,* No. 280, this Term, certiorari denied, October 14, 1940; *Viking Pump Co.* v. *National Labor Relations Board,* No. 606, this Term, certiorari denied, January 13, 1941.

Apart from these considerations, there is no merit in petitioner's contention. In the *Express Publishing* case this Court made it clear that a cease and desist order of the breadth here involved is warranted where "the record disclose[s] persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the Court [finds] or could [find] the threat of continuing and varying efforts to attain the same end in the future." The present case falls within this rule, since the facts

here reveal grave and diverse violations of the Act, inspired by a strong anti-union bias on the part of petitioner's officials. Accordingly, this case falls squarely within the holdings in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 567, 568, 571; and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 543, 544.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MARCH 1941.

APPENDIX

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 157, 158, 159, 160) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10 (e). * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941